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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 BERNADINO GINO SANDOVAL,

12 Plaintiff,

13 v.

14 MIKE R. OBENLAND, et al.,

15 Defendant.
16

CASE NO. 3:17-cv-05667

ORDER ON SECOND REPORT
AND RECOMMENDATION

17 THIS MATTER comes before the Court on the Report and Recommendation of U.S.
18 Magistrate Judge David W. Christel. Dkt. 49. The R&R recommends denial of three motions
19 filed by Plaintiff: Motion for Affidavit (Dkt. 39), Motion for Preliminary Injunction (Dkt. 36),
20 and Motion for Declaratory Judgment (Dkt. 40). Plaintiff does not object to denial of the Motion
21 for Affidavit (Dkt. 39), which the R&R recommends be denied on procedural grounds. Dkt. 55 at
22 2, 3. Plaintiff filed Objections to the R&R for the other two motions, Motion for Preliminary
23 Injunction (Dkt. 36) and Motion for Declaratory Judgment (Dkt. 40). Dkt. 55. This Order, which
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1 adds the following analysis to the R&R, which should be adopted in part and denied in part, and
2 supplemented as follows.

3 A. Motion for Declaratory Judgment (Dkt. 40)

4 Plaintiff seeks a Court order declaring DOC Policy 590.200(I)(F) unconstitutional. Dkt.
5 40 at 3. DOC Policy 590.200(I)(F) was effective until July 17, 2017, when DOC revised its
6 policy. Under DOC Policy 590.200(I)(F), inmates could marry only spouse/state registered
7 domestic partners from an approved visitor list. The Complaint alleges that Plaintiff was denied
8 the right to marry his same-sex partner based on this allegedly unconstitutional policy, and
9 Defendants retaliated against him for exercising his constitutional right. Dkt. 1 at 9. Plaintiff
10 concedes that DOC Policy 590.200(I)(F) is no longer in effect. *See* Dkt. 40 at 3 (“was
11 unconstitutional.”)

12 The R&R recommends denying the motion on mootness grounds, because Plaintiff is no
13 longer in DOC custody. Dkt. 49 at 6. The R&R notes that because the DOC Policy 590.200(I)(F)
14 “has been rescinded, it cannot impact Plaintiff if he re-enters DOC custody[,]” and “entering
15 declaratory judgment prior to determining if Plaintiff’s constitutional rights have been violated is
16 premature.” *Id.*

17 Plaintiff’s Objections do not directly address the merits of the R&R on this motion,
18 except to the extent they overlap with the request for injunctive relief. *See* Dkt. 55.

19 Denying Plaintiff’s motion on mootness grounds misframes the claim for declaratory
20 relief. DOC Policy 590.200(I)(F) was rescinded on July 17, 2017, and this case was filed on
21 August 24, 2018. It would appear that because Plaintiff seeks a declaration that DOC Policy
22 590.200(I)(F) “was unconstitutional,” Dkt. 40 at 3 (emphasis added), the request for declaratory
23 judgment is functionally a request for partial summary judgment on the issue of DOC Policy
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1 590.200(I)(F)’s constitutionality, although it is unclear whether Plaintiff challenges the policy on
2 its face or as applied. Plaintiff separately challenges the constitutionality of DOC Policy
3 590.200(1)(A), a current policy. *See below*. Whether DOC Policy 590.200(I)(F) was
4 unconstitutional, and if so, whether Plaintiff was harmed, may turn on questions of fact unrelated
5 to Plaintiff’s current DOC custody status. If the policy was unconstitutional, either on its face or
6 applied, even if Plaintiff is never again in DOC custody he could, possibly, still be entitled to
7 damages from the Defendants’ retaliation against him for exercising a constitutional right.
8 Therefore, denying the motion on mootness grounds is not warranted.

9 Nonetheless, the Court concurs that Plaintiff’s motion should be denied as premature. No
10 findings as to Plaintiff’s motion should be construed as findings on the merits of this claim.

11 B. Motion for Preliminary Injunction (Dkt. 36).

12 Plaintiff requests injunctive relief against Defendants, who are supervisors or employees
13 of the Washington State Department of Corrections (“DOC”). Dkt. 36 at 1. The motion requests
14 that Defendants be ordered to “cease and desist the continuation of discrimination against same
15 sex marriage . . . through [] Prison Policy DOC 590.200(1)(A) [*sic*].” *Id.* DOC Policy
16 590.200(1)(A) prohibits marriage “between 2 offenders confined in Department facilities.”

17 The R&R recommends denying the request for a preliminary injunction on two grounds:
18 (1) the request is moot, because the DOC policy no longer applies to Plaintiff, who has been
19 released from custody; and (2) Plaintiff has not shown he will suffer irreparable harm, because
20 he is not in custody and the marriage relationship Plaintiff was pursuing has been “abandoned.”
21 Dkt. 49 at 3-5.

22 The Court concurs in the recommended outcome, that Plaintiff’s request for a preliminary
23 injunction should be denied. However, denying the motion on mootness grounds misapprehends
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1 the procedural history. The R&R cites the rule that “[a]n inmate’s release from prison . . . will
2 moot any claims for injunctive relief[,]” but in this case, Plaintiff filed the case *after* release from
3 DOC custody. “[A] case becomes moot when the issues are *no longer* live,” *Porter v. Jones*, 319
4 F.3d 483, 489 (9th Cir. 2003), but at least thus far, DOC Policy 590.200(1)(A) has not yet applied
5 to Plaintiff. Mootness is closely related to the doctrine of ripeness, and Plaintiff’s motion for
6 preliminary injunction should be denied as unripe. This finding should be made without
7 prejudice to the merits of Plaintiff’s DOC Policy 590.200(1)(A) claim.

8 In his Objections, Plaintiff argues that there is a likelihood of reaching the merits,
9 because although Plaintiff is not currently in DOC custody, he is a pretrial defendant in a
10 criminal case and “is facing” the prospect of DOC custody. Dkt. 55 at 2, 3. To reach this
11 argument, the Court would make conjectures about the outcome of an underlying criminal case
12 and make assumptions about the future of Plaintiff’s relational status and the sufficiency of
13 Plaintiff’s marriage request if and when he is in DOC custody. The record does not support
14 making findings on any of these issues, nor would addressing them appear prudent.

15 Plaintiff objects to language in the R&R suggesting that he has “abandoned” the marriage
16 relationship, because, he argues, he has been forced to refrain from communication with his
17 partner by DOC. Dkt. 55 at 2, 3. Assuming that Plaintiff has not, himself, abandoned the
18 marriage relationship has no bearing on the broader finding that at present the Court should
19 decline to reach the merits of Plaintiff’s claim. Plaintiff also requests in the alternative a stay of
20 this case until his criminal matter is resolved, Dkt. 55 at 4, but no information has been provided
21 about when the case may be resolved.

1 The R&R should be adopted as to the recommendation that the motion for preliminary
2 injunction be denied. Plaintiff's request for a stay should be denied. No findings as to Plaintiff's
3 motion should be construed as findings on the merits of this claim.

4 * * *

5 THEREFORE, it is HEREBY ORDERED:

6 The Report and Recommendation (Dkt. 49) is ADOPTED IN PART as follows:

7 (1) Plaintiff's Motion for Affidavit (Dkt. 39) is DENIED.

8 (2) Plaintiff's Motion for Declaratory Relief (Dkt. 36) is DENIED.

9 (3) Plaintiff's Motion for Preliminary Injunction (Dkt. 36) is DENIED.

10 (4) Plaintiff's request for a stay is DENIED.

11 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
12 to any party appearing *pro se* at said party's last known address.

13 Dated this 31st day of July, 2018.

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15 ROBERT J. BRYAN
16 United States District Judge